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No. 99-1015

IN THE
Supreme Court of the United States

JONATHAN D. MAURO,

Petitioner,

v.

JOSEPH M. ARPAIO and MARICOPA COUNTY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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OCTOBER TERM, 1999

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REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Respondents' Brief in Opposition does not attempt to defend the indefensible. The Opposition does not dispute that the Maricopa County Sheriff's Office ("MCSO") policy prohibiting and punishing the possession of materials containing depictions of nudity of any kind—invoked to deny petitioner Jonathan D. Mauro's request for a *Playboy* subscription—is "of unprecedented breadth." A. 20a (B. Fletcher, J., dissenting). The Opposition does not attempt to explain why Respondents, unlike other prison or jail administrators around the nation, chose not to permit any exceptions, even for medical or educational depictions, to

their bright-line rule.[1] Nor does the Opposition dispute that *all* the safeguards on which this Court relied in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), to uphold the facial validity of subject-matter prohibitions on incoming publications are missing from Respondents' policy.

And, rather than defend an *en banc* opinion previously described by Respondents as "addressing important constitutional questions in the jail/ prison setting,"[2] the Opposition proceeds instead to all but ignore those important questions in favor of attacking straw-man arguments unrelated to the suitability of this case for review.

I.

The Opposition barely addresses one of the two questions presented in the certiorari petition: whether, under *Thornburgh*, the First and Fourteenth Amendments can tolerate a jail system prohibiting the possession of expressive materials based on subject matter with *no* individualized consideration of the content of any requested material or the circumstances in which a request is made, and *no* high-level exercise of discretion in considering such a request.

The Opposition does not dispute that since and including *Turner v. Safley*, 482 U.S. 78 (1987), *Thornburgh* stands as the only case in which this Court has addressed how *Turner*'s "reasonableness" standard should be applied to regulations that prohibit expressive materials specifically because of the impact the materials' subject matter might

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[1] Respondents erroneously describe their own policy as banning "'full frontal nudity.'" Opp. 2. The policy, in fact, bans "frontal nudity," which the Deputy Chief testified includes pictures of bare-chested males and females. *See* Pet. A21a n.1, A73a.

[2] Letter from D. Struck to Clerk, U.S. Sup. Ct. (Jan. 5, 2000) (requesting 30-day extension of time).

have on inmates' conduct. Recognizing that outside the prison context, such prohibitions would raise "grave First Amendment concerns," 490 U.S. at 407, the *Thornburgh* Court proceeded with caution in evaluating the Bureau of Prisons regulations before it, upholding their facial validity "comforted by" a number of critical safeguards, *id.* at 416. *See id.* (noting "the individualized nature of the [exclusionary] determinations"); *id.* (observing that "no publication may be excluded unless the warden himself makes the determination" that it is detrimental to security, good order, or discipline); *id.* at 416-17 (noting the requirement that the warden's determination be based on "the conditions prevailing at the institution at the time"); *id.* at 417 (endorsing the regulations' "prohibition against establishing an excluded list of publications").

Nor does the Opposition dispute that every one of these safeguards is missing from the MCSO policy, which, in inflexibly banning depictions of nudity of any kind, requires results that the D.C. Circuit, upholding a considerably narrower ban, called "bizarre" and "all but impossible to believe." *Amatel v. Reno*, 156 F.3d 192, 202 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 2392 (1999).

In response, the Opposition merely argues that "*Thornburgh* does not establish the outer limits of what prison authorities may do in regulating the First Amendment rights of inmates." Opp. 6-7. *See also id.* 7 ("there is nothing in the *Thornburgh* opinion to suggest that such safeguards are constitutionally compelled"). But this argument, far from disposing of any questions, merely raises one: If the Opposition is correct, and *Thornburgh* does not establish the "outer limits" of jail or prison administrators' power to prohibit and punish the possession of expressive materials based on subject matter, then what are the outer limits, and can the "unprecedented" and "all but impossible to believe" policy imposed by the MCSO possibly fall within them?

Review is appropriate to determine the important constitutional question of what safeguards are indeed necessary to protect inmates' First Amendment rights to be free from rules that unreasonably prohibit and punish based on the subject matter of speech, an issue that the Opposition concedes is at least left open by *Thornburgh*.

II.

The principal straw man erected by the Opposition is the erroneous contention that the certiorari petition somehow seeks application of "traditional overbreadth analysis," Opp. 4, in place of the "reasonableness" test required by *Turner* and *Thornburgh*. But the petition nowhere suggests that any test other than the *Turner* "reasonableness" standard is required. Expressly relying on this standard, the petition argues that, "[b]y *rejecting* the safeguards set forth in *Turner* and *Thornburgh* that 'channel[] the reasonableness inquiry,' the *en banc* Ninth Circuit court" inappropriately diminished the scrutiny applied to the actions of prison administrators. Pet. 13 (quoting *Thornburgh*, 490 U.S. at 414) (emphasis added).

The petition does not argue that "traditional overbreadth analysis" should be applied independent of *Turner*'s four-prong test. But it cannot seriously be maintained that overbreadth analysis plays no part in the *Turner* test. As the Third Circuit observed in *Waterman v. Farmer*, 183 F.3d 208 (3d Cir. 1999), there is "substantial overlap between the [*Turner*] test and the doctrine[] of . . . overbreadth," and in applying the *Turner* test, therefore, courts "take[] into account many of the same factors considered under the doctrine[] of overbreadth." *Id.* at 213 & n.6.

Thus, in contending that an inmate plaintiff under *Turner* "lacks standing to challenge the facial breadth" of a

jail policy, Opp. 4, 5,[3] the Opposition makes an argument not even adopted by the *en banc* court, because it is flatly at odds with this Court's precedent. In both *Turner* and *Thornburgh*, this Court entertained facial challenges to prison regulations. *See Turner*, 482 U.S. at 78 ("We conclude . . . that the Missouri marriage regulation is facially invalid"); *Thornburgh*, 490 U.S. at 419 ("we hold that *Turner*'s reasonableness standard is to be applied to the regulations at issue in this case, and that those regulations are facially valid under that standard"). Indeed, in *Turner*, this Court granted relief to female inmates in large part based on facial overbreadth grounds. The prison regulation in that case applied to burden the rights of both female and male inmates to marry. The Court noted, *inter alia*, that since none of the purported justifications for the regulation supported its application to male inmates, the regulation "sweeps much more broadly than can be explained by petitioners' penological objectives," 482 U.S. at 98, and was therefore invalid on its face as to both male and female inmates.[4]

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[3] *See Board of Trustees v. Fox*, 492 U.S. 469, 482-83 (1989) (explaining that the overbreadth doctrine permits a plaintiff to challenge a statute or rule "facially" rather than "as applied" to his own conduct); *Los Angles Police Dep't v. United Reporting Publishing Corp.*, 120 S. Ct. 483, 489 (1999) (discussing "facial overbreadth adjudication") (quotation and brackets omitted).

[4] If the Opposition, which cites a constitutional standing case, *Lewis v. Casey*, 518 U.S. 343 (1996), also intends to suggest that petitioner "lacks standing" in a jurisdictional sense to challenge the MCSO policy on its face, Opp. 4, this would also be incorrect. There is no dispute that petitioner—who was harmed when the policy was applied to deny his request for a *Playboy* subscription—has suffered an "actual injury" for standing purposes. 518 U.S. at 356. *See* R. Rotunda, *et al.*, *Treatise on Constitutional Law* § 20.8, at 270 (3d ed. 1999) (cautioning against "confus[ing] standing and first amendment issues" when engaging in overbreadth analysis).

No court, including the *en banc* court, has adopted the rule against facial challenges that Respondents would propose, and Respondents otherwise cannot seriously dispute that their "astonishingly broad," A. 22a (B. Fletcher, J., dissenting), "unprecedented," *id.* A. 20a, and "all but impossible to believe," *Amatel*, 156 F.3d at 202, no-exceptions ban on nudity "sweeps much more broadly" than can be explained by any legitimate objective, and is therefore invalid on its face. 482 U.S. at 98.[5]

III.

The Opposition's bare assertion that "[t]he Ninth Circuit's *en banc* opinion did not proclaim any new principles of law or seek to undermine *Turner* in any way," Opp. 6, rings especially hollow in light of the conclusion reached by the Ninth Circuit panel in *Frost v. Symington*, 197 F.3d 348 (9th Cir. 1999), that, quite to the contrary, "[i]n very clear and broad language, *Mauro* dramatically diminishes the level of scrutiny that courts are to apply to the decisions of prison administrators," *id.* at 355. The certiorari petition cites *Frost* in three places, Pet. 12, 21, 24. The Opposition's response to these citations—silence—speaks for itself.

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[5] *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), does not provide support for Respondents' overbreadth argument. The Opposition quotes *Young* as holding that in that case it was inappropriate to adjudicate the claims of persons not before the Court. *See* Opp. 4-5. But, through the use of ellipses, the Opposition removes the middle of the quotation, in which the Court explains that a key reason it would not entertain a facial vagueness challenge to the ordinances at issue was that "the limited amount of uncertainty in the ordinances is easily susceptible of a narrowing construction," thus not impermissibly burdening First Amendment rights. 427 U.S. at 61. Here, by contrast, Respondents have never urged a limiting construction on their policy, and no court has found one possible.

Rather than defend the *en banc* court's departure from *Turner*, the Opposition pretends that the only conflict is whether the Ninth Circuit "shirked" an obligation to weigh all relevant factors. Opp. 8. But the *en banc* court did not merely overlook or neglect to apply aspects of the *Turner* test. It explicitly held, using italics to emphasize its point, that it would not even *consider* whether a jail policy was an "exaggerated response" to a perceived problem unless, as a preliminary matter, "an *inmate* claimant can point to an alternative." A. 12a (emphasis in original; quotation omitted). *See also* A. 12a-13a ("[i]t is incumbent upon the *prisoners* to point to an alternative" before a court would consider whether a policy is an exaggerated response) (emphasis in original; quotation omitted). It is this holding, and the *en banc* court's "clear[ly] and broad[ly]" stated decision to diminish the applicable level of scrutiny, *Frost*, 197 F.3d at 355, that conflict with *Turner* and with decisions of the Sixth, Seventh, and Eighth Circuits. *See* Pet. 22-28.[6]

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[6] Respondents' procedural arguments against granting review, *see* Opp. 3-4, do not withstand even minimal scrutiny. Most notably, after invoking the terms "waiver" and "evidentiary problems," *id.* 3, the Opposition does not even attempt to state how (or even whether) such "problems" have any impact on the suitability of this case for review. Perhaps the starkest example is the Opposition's heated complaints about the admissibility of a magazine interview with Respondent Arpaio, *id.* 3 & n.2, despite the fact that the certiorari petition does not even mention that article. Similarly, the Opposition cites a footnote in the *en banc* court's decision to suggest that an argument has been waived, Opp. 3, yet fails to disclose that the argument in question—that *Bell v. Wolfish*, 441 U.S. 520 (1979), rather than *Turner* or *Thornburgh*, should supply the legal standard—was raised by a dissenting judge, not by petitioner, and is not advanced in the petition. *See* A6a n.2 ("Judge Kleinfeld maintains that there is a genuine issue of material fact regarding whether the jail's policy of excluding sexually explicit materials was imposed for the purpose of punishing pretrial detainees. This issue was *not raised by the parties* . . . .") (emphasis added).

CONCLUSION

For the reasons stated herein and in the petition, certiorari should be granted.

Respectfully submitted,

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